Amakannu a/p Veerapan & Ors v Mayland Development Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S-22–354 OF 2010
ZABARIAH MOHD YUSOF JC
30 JULY 2010

Civil Procedure — Injunction — Application for interim injunction — Injunction to restrain defendant from demolishing plaintiffs' houses on land — Balance of convenience — Whether plaintiffs' loss could be compensated in damages — Whether balance of convenience titled in favour of injunction being granted

Civil Procedure — Striking out — Application for — Whether action against defendant should be struck out — Whether plaintiffs had locus standi to institute action against defendant — Whether plaintiffs had reasonable cause of action against defendant — Limitation — Whether plaintiffs' action against defendant was time barred — Rules of the High Court 1980 O 18 r 19

Evidence — Affidavit — Admissibility of — Whether averments contained in affidavit were within deponent's own knowledge — Whether deponent was stranger to matters in issue — Whether affidavit ought to be struck out

The property, which was the subject matter of the present case, was land situated in the district of Kuala Lumpur ('the land') and occupied by some of the plaintiffs. The land was once part of a rubber estate known as the Batu Estate and the plaintiffs were amongst the former rubber estate workers who had worked in the Batu Estate and/or their successors in title. The Batu Estate belonged to Semantan Estate Sdn Bhd ('Semantan'), which had sold the land to Sri Hartamas Develoment Bhd ('Hartamas'). However, the plaintiffs contend that at the time of this sale Semantan, Hartamas and the plaintiffs, as the former Batu Estate employees, had entered into an agreement ('the tripartite agreement') wherein Hartamas had agreed to develop and give low cost houses to the Batu Estate employees. The land had subsequently been bought by the defendant pursuant to a settlement agreement. Although the land was no longer estate land, the plaintiffs who continued to occupy the land refused to vacate the land on the grounds that under the tripartite agreement they had been granted the right to occupy the land. On 9 April 2010, the defendant had entered into a settlement agreement to pay RM10,000 – RM30,000 as ex gratia payment to 31 of the former estate workers. These 31 estate workers had received the ex gratia payment and agreed to vacate the land.

Upon discovering that the defendant intended to develop the land, the plaintiffs commenced a writ action against it wherein it sought, inter alia, a declaration that the defendant was bound by the tripartite agreement, specific performance of the tripartite agreement and damages in lieu of performance. The plaintiffs also applied for an interim injunction to restrain the defendant from demolishing the plaintiffs' houses on the land on the grounds that their action against the defendant would be rendered nugatory if the injunction was not granted. The defendant opposed this application on the grounds that it had entered into a settlement agreement with 31 of the former estate workers to vacate the land and that there were no issues to be tried in this action. At the same time the defendant also applied to strike out the plaintiffs' claim pursuant to O 18 r 19(1) of the Rules of the High Court 1980 ('RHC'). Both the plaintiffs' application for an interim injunction and the defendant's striking out application were heard together as the issues were intertwined. At the hearing the plaintiffs in reliance on O 41 r 5 of the RHC raised a preliminary objection as to the admissibility of an affidavit filed by the defendant. The deponent in this affidavit averred that as the Chairman of the Advisory Board Member and Squatters and Housing Committee of DBKL he had personal knowledge as to the position of squatters in the Federal Territory of Kuala Lumpur and that he had gone to the land and was familiar with the occupants of the same. The plaintiffs submitted that there was no proof that the deponent of this affidavit had been appointed as the Chairman of the Advisory Board Member and Squatters and Housing Committee of DBKL and that the said affidavit affirmed by the deponent ought to be struck out.

Held, dismissing the plaintiffs' application for an injunction with costs and allowing the defendant's application to strike out the plaintiff's action with costs:

(1) The plaintiff's objection on the admissibility of the affidavit is highly misconceived at this stage as an affidavit can be affirmed based on one's personal knowledge of the matter herein. As a general rule, O 41 r 5(1) regulates the contents of an affidavit, viz only such facts as the deponent was able of his own knowledge to prove. However, as an exception O 41 r 5(2) allows an affidavit sworn for the purpose of being used in interlocutory proceedings. In the present case, the deponent was only affirming such facts as he was able to prove and to which he was not a stranger and the said affidavit was sworn for the purpose of being used in interlocutory proceedings. Hence the said affidavit could not be struck out and the plaintiffs' objection in respect of the same was dismissed (see paras 19–21 & 26–27).

(2) It was found that of the 31 plaintiffs in this suit only three, namely the third, fourth and 24th plaintiffs were former estate workers occupying the land (the first category), the others were either former estate workers no longer occupying the land (the second category) or those who were

neither estate workers nor occupying the land (the third category). The court held that those who belonged to the first category were trespassers and squatters since the consent or licence for them to occupy the land had expired; that the second category of plaintiffs were estopped from claiming any interest on the land as they were no longer occupying the land; and that the third category of plaintiffs who had never had any licence or consent for occupying the land had not right to claim against the defendant for any interest on the land. Thus, the plaintiffs had no locus standi to bring this claim against the defendant (see paras 30 & 34–37).

(3) The plaintiffs' entire cause of action, which was premised on the tripartite agreement, could not stand because the said tripartite agreement was neither signed nor dated. Thus, the plaintiffs had no reasonable cause of action against the defendant. Further, even if the tripartite agreement was validly executed the defendant was not a party to it. As such, the tripartite agreement was not enforceable against the defendant and the relief sought by the plaintiffs for specific performance of the tripartite agreement against the defendant was highly misconceived and clearly frivolous. In any event, even if the defendant was bound by the tripartite agreement, the plaintiffs are barred by the Limitation Act 1950 as the action was founded on a contract(the tripartite agreement), which was executed in 1976, ie six years from the date on which the cause of action accrued (see paras 38–39, 47–48 & 50–51).

(4) If the application for an injunction by the plaintiffs was to be allowed that would tantamount to depriving the defendant, who was the purchaser of the land since 1999 and thus the rightful owner, from its rights. The defendant's losses could not be compensated by the plaintiffs, who did not have any proprietary rights to the land as opposed to the defendant. Further the plaintiffs were not in a position to give any undertaking as to damages and it was also clear from the alternative relief sought for by the plaintiffs that damages were an adequate remedy. Thus the balance of convenience tilted in favour of the court not granting the injunction against the defendant (see paras 68–73).

[Bahasa Malaysia summary

Hartanah tersebut, yang merupakan hal perkara kes ini, adalah tanah yang terletak dalam daerah Kuala Lumpur ('tanah tersebut') dan didiami oleh beberapa plaintif. Tanah tersebut dahulunya merupakan sebahagian tanah ladang getah yang dikenali sebagai Batu Estate dan plaintif-plaintif merupakan antara bekas pekerja-pekerja ladang getah yang pernah bekerja dengan Batu Estate dan/atau pengganti-penggantinya dalam hakmilik. Batu Estate dipunyai oleh Semantan Estet Sdn Bhd ('Semantan'), yang telah menjual tanah tersebut kepada Sri Hartamas Development Bhd ('Hartamas'). Namun, plaintif-plaintif menghujah bahawa pada masa penjualan ini, Semantan,

Hartamas dan plaintif-plaintif, sebagai bekas pekerja-pekerja Batu Estate, telah mendatangani satu perjanjian ('perjanjian tiga pihak') di mana Hartamas telah bersetuju untuk membangunkan dan memberikan rumah-rumah kos rendah kepada pekerja-pekerja Batu Estate. Tanah tersebut kemudiannya dibeli oleh defendan berikutan dengan perjanjian persetujuan. Walaupun tanah tersebut bukan lagi tanah estet, plaintif-plaintif yang masih mendiami tanah tersebut enggan mengosongkan tanah itu atas alasan-alasan bahawa di bawah perjanjian tiga pihak mereka telah diberi hak mendiami di atas tanah tersebut. Pada 9 April 2010, defendan telah menandatangi perjanjian persetujuan untuk membayar RM10,000–RM30,000 sebagai bayaran ex gratia kepada 31 bekas pekerjanya. 31 pekerja estet ini telah menerima bayaran ex gratia dan bersetuju pindah keluar dari tanah tersebut. Apabila mengetahui bahawa defendan ingin memajukan tanah tersebut, plaintif-plaintif memulakan writ tindakan terhadapnya, memohon, antara lain, perisytiharan bahawa defendan terikat dengan perjanjian tiga pihak tersebut, pelaksanaan spesifik perjanjian tiga pihak dan ganti rugi sebagai ganti pelaksanaan. Plaintif-plaintif juga memohon injunksi interim untuk menghalang defendan daripada merobohkan rumah-rumah plaintif di atas tanah tersebut atas dasar bahawa tindakan mereka terhadap defendan akan menjadi tidak berguna jika injunksi tersebut tidak diberikan. Defendan menentang permohonan ini atas dasar bahawa ia telah menandatangani perjanjian persetujuan dengan 31 bekas pekerja estet untuk mengosongkan tanah tersebut dan tiada isu yang perlu dibicarakan dalam tindakan ini. Pada masa yang sama, defendan juga memohon untuk membatalkan tuntutan plaintif-plaintif berikutan A 18 k 19(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Kedua-dua permohonan plaintif untuk injunksi sementara dan permohonan pembatalan defendan didengar bersama kerana isu-isunya berkait. Semasa pendengaran, plaintif-plaintif, bergantung kepada A 41 k 5 KMT membangkitkan bantahan awalan terhadap kebolehterimaan afidavit yang difailkan oleh defendan. Deponen dalam afidavit ini menegaskan bahawa sebagai Pengerusi kepada Lembaga Penasihat dan Jawatankuasa Setinggan dan Perumahan DBKL, dia mempunyai pengetahuan peribadi tentang kedudukan setinggan di Wilayah Persekutuan Kuala Lumpur dan bahawa dia telah melawat tanah tersebut dan sudah biasa dengan penduduk-penduduknya. Plaintif-plaintif berhujah bahawa tiada bukti bahawa deponen afidavit ini telah dilantik sebagai Pengerusi kepada Lembaga Penasihat dan Jawatankuasa Setinggan dan Perumahan DBKL dan bahawa afidavit tersebut yang diikrarkan oleh deponent harus dibatalkan.

Diputuskan, menolak permohonan plaintif-plaintif untuk injunksi dengan kos dan membenarkan permohonan defendan untuk membatalkan tindakan plaintif dengan kos:

(1) Bantahan plaintif-plaintif terhadap kebolehterimaan afidavit telah disalah anggap pada peringkat ini kerana afidavit boleh diikrarkan

berdasarkan pengetahuan peribadi seseorang tentang perkara itu. Sebagai peraturan am, A 41 k 5(1) KMT mengatur isi kandungan afidavit, iaitu hanya fakta-fakta yang boleh dibuktikan atas pengetahuan deponen sendiri. Tetapi, sebagai pengecualian, A 41 r 5(2) membenarkan afidavit diikrarkan untuk digunakan dalam prosiding interlokutori. Maka, afidavit tersebut tidak boleh dibatalkan dan bantahan plaintif-plaintif bagi perkara yang sama ditolak (lihat perenggan 19–21 & 26–27).

(2) Didapati bahawa daripada 31 plaintif dalam tindakan ini hanya tiga, iaitu plaintif ketiga, keempat dan ke-24 merupakan bekas pekerja-pekerja estet yang masih mendiami tanah tersebut ('kategori pertama'), yang lainnya, sama ada mereka merupakan bekas pekerja-pekerja estet yang tidak lagi tinggal di atas tanah tersebut ('kategori kedua') atau mereka yang bukannya pekerja-pekerja estet mahupun tinggal di atas tanah tersebut ('ketegori ketiga'). Mahkamah memutuskan bahawa mereka yang berada dalam kategori pertama adalah penceroboh dan penduduk setinggan kerana kebenaran atau lesen untuk mereka mendiami tanah tersebut telah tamat tempoh; bahawa plaintif-plaintif dalam kategori kedua diestop daripada menuntut apa-apa faedah atas tanah tersebut kerana mereka tidak lagi mendiami atas tanah tersebut; dan bahawa plaintif-plaintif dalam kategori ketiga yang tidak pernah memiliki lesen atau kebenaran untuk mendiami atas tanah tersebut tiada hak untuk menuntut terhadap defendan bagi apa-apa faedah atas tanah tersebut. Oleh itu, plaintif-plaintif tiada locus standi untuk membawa tindakan ini terhadap defendan (lihat perenggan 30 & 34–37).

(3) Keseluruhan kausa tindakan plaintif-plaintif, yang bergantung kepada perjanjian tiga pihak tersebut, tidak kukuh kerana perjanjian tiga pihak itu tidak dimeterai ataupun bertarikh. Oleh itu, plaintif-pliantif tiada kausa tindakan yang wajar terhadap defendan. Selanjutnya, walaupun jika perjanjian tiga pihak itu disempurnakan dengan sah, defendan bukanlah pihak kepada perjanjian tersebut. Maka, perjanjian tiga pihak tersebut tidak boleh dilaksanakan terhadap defendan dan relief yang dipohon plaintif-plaintif untuk pelaksanaan spesifik perjanjian tiga pihak terhadap defendan adalah satu salah tanggap dan amatlah remah. Dalam apa keadaan pun, walaupun jika defendan terikat dengan perjanjian tiga pihak tersebut, plaintif-plaintif dihalang oleh Akta Had Masa 1950 kerana tindakan tersebut adalah berdasarkan kontrak (perjanjian tiga pihak tersebut), yang mana disempurnakan pada 1976, iaitu enam tahun dari tarikh kausa tindakan berkuat kuasa (lihat perenggan 38–39, 47–48 & 50–51).

(4) Jika permohonan bagi suatu injunksi oleh plaintif-plaintif dibenarkan, perkara itu akan menafikan defendan, yang merupakan pembeli tanah tersebut sejak 1999 dan merupakan pemilik yang sah, daripada

mendapat haknya. Kerugian defendan tidak boleh dipampaskan oleh plaintif-plaintif, yang tidak mempunyai apa-apa hak proprietari terhadap tanah tersebut, berbanding dengan defendan. Selanjutnya, plaintif-plaintif tidak boleh memberi apa-apa akujanji terhadap ganti rugi dan juga adalah jelas daripada relief alternatif yang dipohon plaintif-plaintif, ganti rugi merupakan remedi yang berpatutan. Oleh itu, imbangan kemudahan memihak kepada mahkamah tidak membenarkan injunksi terhadap defendan (lihat perenggan 68–73).]

Notes

For a case on application for interim injunction, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) para 3172.

For cases on admissibility of affidavit, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 313–342.

For cases on application for striking out, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 7478–7481.

Cases referred to

Filati Lastex Elastofibre (M) Sdn Bhd v Nikseng Development Sdn Bhd [2009] 8 MLJ 374, HC (refd)

Mega Sakti Sdn Bhd v Wong Wai Hoi & Ors [2008] 5 MLJ 321, CA (distd)

Nasri v Mesah [1971] 1 MLJ 32, FC (refd)

Padang Serai Kilang Kayu Bhd v Khor Kia Fong & Ors [1998] 1 MLJ 589, HC (refd)

Re Public Bank Bhd [2001] 6 MLJ 330, HC (distd)

Syarikat Jeleta Bumi Sdn Bhd & Anor v Nadarajah a/l Ramasamy & Ors [2003] 5 MLJ 542, HC (distd)

Legislation referred to

Companies Act 1965 s 114

Limitation Act 1950 ss 6, 9, 9(1)

Rules of the High Court 1980 O 41 r 5, 5(2), O 18 r 19(1), O 41 r 6, O 89

Stamp Act 1949

K Selvakumaran (SP Muthu Veloo with him) (SP Veloo & Co) for the plaintiffs.

Wong Kian Kheong (Karen Lee Foong Woon and TS Yeoh with him) (Wong Kian Kheong) for the defendant.

Zabariah Mohd Yusof JC:

[1] Enclosure 15 is the application by the defendant to strike out the claim by the plaintiffs under O 18 r 19(1) of the Rules of the High Court 1980.

[2] Enclosure 3 is an inter partes injunction by the plaintiffs, amongst others,

to restrain the defendant from demolishing the plaintiffs' houses lands held under Grant No 9413 Lot No 26643 and grant No 9414 Lot No 26644 in the Mukim of Batu, District of Kuala Lumpur, owned by the defendant.

[3] Both enclosures were heard together as the issues are intertwined.

BACKGROUND FACTS

[4] The property in question are all that pieces of lands held under Grant No 9413 Lot No 26643 and grant No 9414 Lot No 26644 in the Mukim of Batu, District of Kuala Lumpur and State of Wilayah Persekutuan (the said land).

[5] The said lands were once part of a rubber estate known as Batu Estate. The said Batu Estate and the adjoining Segambut Estate belonged to Semantan Estate Sdn Bhd.

[6] The case of the plaintiffs is as follows:

[7] The plaintiffs are amongst the former estate workers who had worked in Batu Estate and/or their successors in title and as such were allegedly allowed to stay on the land.

[8] On or about 1978–1979, Semantan Estate Sdn Bhd was desirous of selling the said estates to Sri Hartamas Development Sdn Bhd.

[9] Various meetings were held between Semantan Estate Sdn Bhd, Sri Hartamas Sdn Bhd and the representatives of the said estates. As a result of the meetings an understanding was reached between the parties which was later reduced to writing in an agreement ('the tripartite agreement')

[10] The plaintiffs contend that they are one of the parties in the tripartite agreement between Semantan Estates Sdn Bhd ('Semantan Estate'), Sri Hartamas Development Sdn Bhd ('Sri Hartamas') and Batu Estate employees.

[11] One of the terms of the tripartite agreement is that Sri Hartamas agreed to develop and give a low cost house to each of the Ladang Batu Estate employees. The said houses are to be developed in a land held under Geran No 9413 Lot 26643 and Geran No 9414 Lot No 26644 Mukim Batu KL.

[12] The said land was subsequently bought by the defendant from Sri Hartamas on 16 November 1998 pursuant to a settlement agreement (exh SAA1 of encl 15B). The land is no longer an estate land and is still being occupied by some of the plaintiffs.

[13] Recently on 9 April 2010, the defendant had entered into a settlement agreement with some of the Batu Estate employees (31 of them) whereby the defendant would pay RM10,000–RM30,000 as ex gratia payment in consideration of vacant possession of the land to be given to the defendant.

[14] As the structure of the houses in the land was built very close and connected to each other, the plaintiffs contend that the demolition of one would affect the other houses.

[15] Hence, the plaintiffs in their writ of summons pray for:

(a) a declaration that the alleged tripartite agreement is valid;

(b) a declaration that the alleged tripartite agreement binds the defendant;

(c) specific performance of the tripartite agreement;

(d) mandatory injunction to compel the defendant to provide the plaintiffs each a low cost house; and

(e) damages in lieu of performance.

[16] The plaintiffs aver the following grounds in making this application:

(a) the defendant would demolish the said houses and the plaintiffs' action herein would be nugatory if the injunction is not granted; and

(b) to maintain status quo of the land pending the disposal of the plaintiffs' action herein.

[17] The defendant avers the following in opposing the application for an interim injunction:

(a) the defendant had entered into a settlement agreement with 31 of the employees on 9 April 2010 and many of them have left their houses and left vacant;

(b) the defendant bought the land in 1999 and it was bought with a hefty payment. From 1999 and till todate the defendant cannot develop the land as the squatters still stay there and refused to leave the land; and

(c) there is no issues to be tried.

THE COURT'S FINDINGS

Preliminary objection by the plaintiff on encl 28 ie an affidavit in reply of the defendant

[18] The objection is on encl 28, as a third party had sworn an affidavit of the

defendant and that there is no proof that the deponent had been authorised or appointed as the Chairman of the Advisory Board Member and Squatters and Housing Committee of DBKL.

[19] It is to be noted that this is an interlocutory hearing and not a final hearing to dispose off the entire suit. The plaintiff is objecting on the admissibility of the affidavit. It is highly misconceived at this stage for the court to disallow the admissibility of the said affidavit, as an affidavit can be affirmed based on one's personal knowledge of the matter therein. If there is to be any issue it would be on the weight that ought to be attached to it, not on the issue of admissibility.

[20] Order 41 r 5 of the Rules of the High Court 1980 relied on by the plaintiff is of no assistance to the plaintiff. It reads as follows:

> (5(1) Subject to Order 14, rules 2(2) and 4(2), to paragraph (2) of this rule and to any order made under Order 38 Rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.
>
> (2) An affidavit sworn *for the purpose of being used in interlocutory proceedings* may contain statements of information or belief with the sources and grounds thereof.

[21] As a general rule, O 41 r 5(1) regulates the contents of an affidavit viz only such facts as the deponent is able of his own knowledge to prove. As an exception O 41 r 5(2) allows an affidavit, sworn for the purpose of being used in interlocutory proceedings, to contain statements of information or belief with the sources and grounds thereof. The case of *Mega Sakti Sdn Bhd v Wong Wai Hoi & Ors* [2008] 5 MLJ 321 and *Re Public Bank Bhd* [2001] 6 MLJ 330 can be distinguished from our present case. In the case of *Mega Sakti* it involves the application by the appellants who were purchasers of a condominium, for leave to intervene in the proceedings between the respondent (developer) and another party and to set aside the stay order of a winding up order. The affidavit in support of the application was affirmed by one Dr William Lau who was a *total stranger* to the proceedings and there has not been any confirmation by the appellants therein that the deponent had been authorised to act for them. The court held that 'To emphasise on the 'stranger' aspect he could not have any personal knowledge of the sources of any of his assertion or its truth *as he never was one of the purchasers*'. Hence the court had no hesitation in rejecting Dr William Lau's affidavit which was in support of the appellant's application to intervene. In this case Dr William Lau was a total stranger in that he was not authorised by the appellant and neither was he one of the purchasers. Still the court in *Mega Sakti* did not rule that the affidavit was inadmissible. Similarly in the case of *Re Public Bank*, it involves the seeking of an order under s 114 of the Companies Act 1965 that the lodgment with the registrar of companies of

registration of two charges it had created in respect of two pieces of land be extended. This is not in relation to an interlocutory application. There the deponent was a person with no specific function but had been authorised by the applicant to affirm an affidavit. But what is pertinent to observe in *Re Public Bank* is that the said affidavit was not ruled as inadmissible but the court merely states that the affidavit was inadequate to support the application therein (refer to p 338 paras B–C of the report) and that the supporting affidavit failed to meet up with the requirement under s 114 of the Companies Act 1965 (refer to p 338 para E of the report). Again nowhere the court had ruled that the affidavit was inadmissible.

[22] From both of the cases shown, the courts did not rule that the affidavits were inadmissible or to be struck out. The court may order any affidavit to be struck out if it considers such affidavit as scandalous, irrelevant or otherwise oppressive (O 41 r 6 of the Rules of the High Court 1980), which is not the case here.

[23] The deponent in encl 28 avers that he is the Chairman of the Advisory Board Member and Squatters and Housing Committee of DBKL and has personal knowledge as to the position of squatters in the Federal Territory of Kuala Lumpur. He further avers in para 4 of encl 28 that:

> saya telah dilantik, selaku jawatan saya sebagai salah seorang ahli lembaga penasihat DBKL, oleh Timbalan Menteri Wilayah Persekutuan Y.B. M. Saravanan untuk mengengendalikan semua hal ehwal perkara mengenai penduduk-penduduk … diatas tanah-tanah yang dimiliki defendan …

[24] The contents of the other paragraphs of enclosure explained the deponent's scope of work as 'ahli lembaga penasihat DBKL' which includes matters pertaining to movement of the occupiers out of the land, provision of alternative accommodation to the occupiers and the demolition of the houses of the occupiers of the said land in question.

[25] The deponent avers that due to his designation he has gone to the said lands and is familiar with the occupants of the same.

[26] The deponent was affirming 'such facts as the deponent is able of his own knowledge to prove'. He is not a stranger to the matter in issue which is pertaining to the occupiers of the said land, and that is precisely what he avers in his affidavit encl 28 is an affidavit sworn for the purpose of being used in interlocutory proceedings which contain statements of information or belief by the deponent with the sources and grounds thereof. Hence encl 28 cannot be struck out.

[27] Therefore the preliminary objection of the plaintiffs' encl 28 is dismissed.

Locus standi of the plaintiffs

[28] Some of the plaintiffs do not have locus standi to bring this action as according to the census made by DBKL in 29 Ocotober 2009 only 52 families were staying at the said land at the material time (exh SAA1 of encl 6).

[29] On 9 April 2010, the defendant had entered into a settlement agreement with 31 of the settlers whereby payment of ex gratia was made to the 31 occupants. These 31 occupants have received the ex gratia payment and agreed to vacate the land.

[30] Out of 31 plaintiffs in this suit herein:

(a) only the third plaintiff, fourth plaintiff and the 24th plaintiffs are formerly estate workers and are occupying the land (first category);

(b) the first, fifth, sixth, 25th, and 29th plaintiffs are formerly estate workers and they are no longer occupying the land (second category); and

(c) the rest of the plaintiffs were not estate workers nor were they occupying the land (third category).

[31] In this respect exh RC1 of encl 28 is referred.

[32] For the first category of the plaintiffs they entered the land with license from Semantan Estate which was for a specific purpose ie to work in the estate. This licence was terminated when Batu Estate ceased operation and the land was sold by Semantan Estate to Sri Hartamas.

[33] Even if it was argued that the first category had the consent from Semantan Estate and Sri Hartamas to occupy the land with consent, the consent was revoked when Sri Hartamas sold the land to the defendant and the defendant had never given any consent to the plaintiffs.

[34] Clearly the 'consent' and the 'license' have both expired, thus the first category of the plaintiffs are actually trespassers and squatters to the land.

[35] For the second category of the plaintiffs they are no longer occupying the land and is thus estopped from claiming for any interest on the land.

[36] For the third category of the plaintiffs there had never been any license nor consent for the occupation of the land. Hence the third category of the plaintiffs have no right to claim against the defendant for any interest on the land.

[37] Therefore clearly the plaintiffs have no locus to bring this claim against the defendant.

No issues to be tried

[38] The plaintiffs entire cause of action is premised on the tripartite agreement.

[39] The alleged tripartite agreement was allegedly signed by the estate workers. Refer to exh SAA2 of encl 15B. The terms of the said agreement are:

(a) Sri Hartamas agreed to allow the estate workers to occupy the land for as long as they were on temporary employment in the estates and the land was not yet required for housing development;

(b) Sri Hartamas would offer each worker the purchase of one unit of low cost house in their development; and

(c) Sri Hartamas would consider a nominal discount of RM500 per house for the estate workers.

[40] A perusal of the tripartite agreement shows that:

(a) it does not contain any signature and name of Semantan Estate's representative;

(b) it does not contain any signature and name of Sri Hartamas's representative;

(c) it does not contain the names and signatures of all of the estate workers;

(d) it does not contain date of the alleged tripartite agreement; and

(e) it does not have any evidence of it being stamped under the Stamp Act 1949.

[41] Since 26 December 2001, the plaintiffs' solicitors had written to Koperasi NESA and the Federal Territory Labour Department for a copy of the duly signed and sealed of the alleged tripartite agreement allegedly dated 1978, but to no avail.

[42] Since the plaintiffs are alleging that there was a tripartite agreement entered between the parties, the burden is on the plaintiffs to show:

(a) the existence of the tripartite agreement;

(b) that it is a validly executed agreement entered between the parties; and

(c) the obligations of parties that ought to be enforced.

[43] To date these have not been proven.

[44] Hence the substratum of the plaintiffs cause of action is premised on an unsigned and an undated agreement. I agree with the submission of the defendant that the action of the plaintiffs herein stands on a speculative piece of evidence. There is thus no reasonable cause of action against the defendant.

[45] Further, even assuming for a moment, that the tripartite agreement was validly executed and existed with proper terms, it is to be observed that the tripartite agreement was between:

(a) ex-employees of the estate;

(b) Semantan Estate Sdn Bhd; and

(c) Sri Hartamas Sdn Bhd.

[46] It is to be noted that, except for plaintiffs 1, 3–6, 24–25 and 27, the rest of the named plaintiff herein are not ex-employees of the Batu Estate (refer exh BE3 of encl 2).

[47] The defendant is not a party to the tripartite agreement as exhibited in BE2 of the plaintiffs first affidavit in encl 2. There is no link or privity of the defendant to the tripartite agreement which renders the tripartite agreement unenforceable against the defendant.

[48] Hence, the defendant has no legal obligation under the terms of the tripartite agreement. The enforcement, if any should be against Semantan Estate Sdn Bhd and Sri Hartamas Sdn Bhd, not the defendant. Moreover the agreement exhibited in BE2 is only a draft.

[49] There is also no provision in the tripartite agreement that states that it will bind the successors or heirs of the agreement ie the defendant.

[50] Since the defendant is not a party in the tripartite agreement, the relief

A sought by the plaintiffs for specific performance of the tripartite agreement against the defendant is highly misconceived. The action by the plaintiffs herein is clearly frivolous.

B **[51]** In any event, if assuming for a moment that the defendant is bound by the tripartite agreement, the plaintiffs are barred by the Limitation Act 1950 as the tripartite agreement was executed in 1976. Section 6 of the Limitation Act 1950 provides that any action founded on contract shall not be brought after the expiration of six years from the date on which the cause of action accrued. I agree with the submission of the defendant's counsel that there are two C possible dates by which the plaintiffs cause of action could have accrued ie:

(a) in 1978 when the alleged tripartite agreement was signed; or

(b) on 16 November 1998 when the settlement agreement between the vendors and the defendant was signed, as that was the date when the D promise to provide the houses to the plaintiffs failed to materialise.

[52] The plaintiffs' counsel cited case law authorities and states that the limitation period is not based on a breach of contract but based on the recovery of land and hence the limitation period is 12 years pursuant to s 9(1) of the E Limitation Act 1950. In any event, counsel for the plaintiffs submits that whether ss 6 or 9 of the Limitation Act 1950 applies, is by itself a triable issue, and it ought to be determined at full trial and not dismissed summarily.

F **[53]** My view on the issue of limitation is that it involves the construction of documents and determination of issues on points of law. Merely to determine the question of limitation period does not require a full trial or the evidence of witnesses at a full blown hearing. The plaintiffs are seeking for specific performance of the alleged tripartite agreement. Clearly the cause of action is G on breach of contract. Nowhere have the plaintiffs relied on s 9(1) of the Limitation Act 1950 ie recovery of land, in their pleadings. The cases cited by the plaintiffs are inapplicable to our case herein as they relates to bona fide purchasers (not squatters) of land seeking for reliefs of specific performance.

H **[54]** In *Nasri v Mesah* [1971] 1 MLJ 32, it concerns specific performance of a sales and purchase agreement which was entered between the plaintiff and the defendant. The prayer of the plaintiff there was for an order that the defendant do execute a valid and a registrable transfer of the land. 'In effect he was seeking to do was to obtain the land by a judgment of the court.'

I

[55] The case of *Padang Serai Kilang Kayu Bhd v Khor Kia Fong & Ors* [1998] 1 MLJ 589 also with regards to the claim of the plaintiff for a declaration that the land belongs to him and also for specific performance of the agreement between the parties.

[56] Similarly in *Filati Lastex Elastofibre (M) Sdn Bhd v Nikseng Development Sdn Bhd* [2009] 8 MLJ 374 is also for specific performance of a sales and purchase agreement which was entered between the plaintiff and the defendant.

[57] All the three cases above relates to recovery of land pursuant to a sale and purchase agreement which was entered between the parties. Rightly so, the limitation period should be 12 years pursuant to s 9 of the Limitation Act 1950. None of the cases cited involved squatters.

[58] In our case herein it relates to the plaintiffs who have no license or consent to remain on the land which was owned by the defendant. The fact as stated at para 9(a) of the settlement agreement between the vendor and the defendant (exh SAA1 of encl 15B) dated 16 November 1998, that the land was sold to the defendant by the vendor on an 'as is where is' basis does not connote recognition of squatters rights. There was no agreement on the part of the defendant when the land was sold by the vendors to the defendant that the defendant was to take the land with the squatters.

[59] The plaintiffs also sought to rely on the case of *Syarikat Jeleta Bumi Sdn Bhd & Anor v Nadarajah a/l Ramasamy & Ors* [2003] 5 MLJ 542 where it was submitted that the facts are on all fours with our case herein. It was held in that case that 'the balance of convenience tilted very much in favour of the defendants who had been in occupation of the premises for a number of generations. To ask them to vacate and caused the quarters to be demolished would certainly have caused the defendants great hardship, having regard to the fact that they are poor people with no alternative place to stay'.

[60] However, on reading the facts of *Syarikat Jeleta Bumi Sdn Bhd* shows the facts can be distinguished with our present case. In *Syarikat Jeleta Bumi Sdn Bhd*, 'there was a meeting of 19 October 2001 between the plaintiffs and NUPW where it was stated in the minutes of meeting that 'the workers will only vacate their quarters upon receiving their new low cost houses from the developer'. And in another meeting of 6 November 2001 it was stated that 'the condition given by the state government is the developer must build alternative housing for the workers before they could vacate their quarters'. Ultimately, in *Syarikat Jeleta Bumi Sdn Bhd* it is stated 'Hence *with such evidence* the defendants have shown that they have a claim to proprietary interest in the said land. This is a triable issue which should not be summarily dismissed without trial'.

[61] In contrast to the facts in our case, the plaintiffs herein have not shown any evidence that they have a proprietary interest as was present in the case of *Syarikat Jeleta Bumi Sdn Bhd*.

[62] Further, the plaintiffs sought to rely on a 'without prejudice' letter in exh LD1 encl 29 in support of the argument that there is a fresh accrual of cause of action.

[63] However my view on this is that, firstly, the said letter is a 'without prejudice' letter. It is pertinent to note that parties often make the statement 'without prejudice' as part of an attempt to settle a dispute. When this is done, the contents of the statement cannot be put in evidence without the consent of both parties. The statements often relate to the offer of a settlement and, were it not for the privilege, they would constitute significant items of evidence on the ground that they were admissions. It is in the public interest that disputes are encouraged to be settled to reduce litigation to a minimum. The policy of the law has been in favour of enlarging the cloak under which negotiations may be concluded without prejudice.

[64] Secondly, there is no admission of liability on the part of the defendant in the said letter.

[65] Thirdly, the proposal for settlement in that letter was meant to be for another suit which was pending.

[66] Therefore the plaintiffs' cause of action is frivolous and vexatious as it is time barred pursuant to s 6 of the Limitation Act 1960.

BALANCE OF CONVENIENCE

[67]

(a) The defendant is the owner of the said land since 1999;

(b) during these 11 years the defendant has not been able to develop the land due to the presence of the plaintiffs who have no rights or interests on the land;

(c) the lands were bought by the defendant at a high price;

(d) the defendant has been paying assessment and quit rent on the land since 1999. Copies of the receipts of payments of quit rent and assessment are exhibited in exh SAA9 of encl 8.

(e) the defendant has been deprived of the pecuniary benefits which it ought to have reaped from the development of the land which they owned;

(f) plaintiffs 1, 2, 5–7, 9–10, 14–21, 25–31 are not the occupiers of the land according to the census done by DBKL;

(g) there are a lot of delipidated houses on the land;

(h) although the settlement agreement had been executed by the defendant with the 31 occupants on the land, in the event the application of the plaintiffs are allowed by this court, the defendant would be deprived from executing its lawful rights under the settlement agreement.

[68] If the application for injunction by the plaintiffs is to be allowed, that would tantamount to depriving the defendant, who are the purchasers of the land and thus are the rightful owners of the same, of their rights. The defendants would incur huge amount of losses in which could not be compensated by the plaintiffs herein.

[69] As far as the plaintiffs are concerned they do not have any proprietary rights on the land as opposed to the defendant.

UNDERTAKING AS TO DAMAGES

[70] There is no undertaking as to damages by the plaintiffs. In any event the plaintiffs are in no position to give any undertaking as to damages.

[71] There are no special circumstances adduced by the plaintiffs that can exempt the plaintiffs from giving an undertaking as to damages in the event the granting of the injunction against the defendant was wrong. This is in direct opposition to the defendant who is in a position to compensate for damages to the plaintiffs in the event the injunction is not granted.

Whether damages is an adequate remedy

[72] It is clear from the alternative reliefs prayed for by the plaintiffs those damages are an adequate remedy.

[73] Thus the balance of convenience tilts in favour of the court in not granting the injunction against the defendant.

ISSUE OF THE TWO EARLIER APPLICATIONS MADE UNDER O 89 WHICH WERE NOT ALLOWED BY THE COURT

[74] At that point in time when the matter was heard before Justice Azmel Maamor for an application under O 89 of the Rules of the High Court 1980, the burden was on the defendant to prove that there was no triable issue. It may well have been that the defendant has failed to discharge the burden of proof for the application at the trial of the said matter under O 89 of the Rules of the High Court 1980.

[75] In any event this court is not bound by the decision of Justice Azmel Maamor which is a decision of another High Court of co-ordinate jurisdiction.

[76] Therefore based on the abovesaid, encl 15 is allowed with costs.

[77] Enclosure 3 is dismissed with costs.

Plaintiff's application for an injunction dismissed with costs and the defendants application to strike out the plaintiff's action allowed with costs.

Reported by Kohila Nesan